

DOCUMENT RESUME

02710 - [A1852892]

[Contract Award for Product Requiring Qualified Product List Listing]. B-188774. June 24, 1977. 4 pp.

Decision re: Products Support, Inc.; by Robert F. Keller, Deputy Comptroller General.

Issue Area: Federal Procurement of Goods and Services:
Definition of Performance Requirements in Relation to Need of the Procuring Agency (1902).

Contact: Office of the General Counsel: Procurement Law II.

Budget Function: National Defense: Department of Defense - Procurement & Contracts (058).

Organization Concerned: Parker-Hannifin Corp.; Department of the Navy: Aviation Supply Office, Philadelphia, PA.

Authority: B-182536 (1975).

The protester objected to the award of a contract under a request for proposal which required that the air refueling nozzles be furnished in accordance with the Qualified Products List (QPL) listing. The award to the only firm meeting the QPL listing requirement in the face of a lower priced offer from a would-be competitor was not improper where unacceptable delays would be incurred by postponing the award until the competitor could qualify for QPL listing. An antitrust consent judgment requiring the awardee to divest itself of the product line which includes the article being procured does not preclude the award where deliveries are scheduled to be completed prior to the date for compliance with the decree. The protest was denied.

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J. N. ...
Parker

DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20548**

FILE: B-188774

DATE: June 24, 1977

MATTER OF: Products Support Incorporated

DIGEST:

1. Award to only firm meeting QPL listing requirement in face of lower priced offer from would-be competitor is not improper where competitor has not qualified for QPL listing and unacceptable delays would be incurred by postponing award until competitor could qualify.
2. Anti-trust consent judgment requiring awardee to divest itself, within 32 months from date of entry of decree, of product line which includes article being procured, does not preclude award where deliveries are scheduled to be completed prior to end of such period.

Products Support Incorporated (PSI) is protesting the award of a contract to Parker Hannifin Corporation (Parker) under request for proposals (RFP) No. N00383-77-R-0203, issued by the Department of the Navy, Aviation Supply Office (ASO), Philadelphia, Pennsylvania, for a quantity of air refueling nozzles. The RFP required that the nozzles be furnished in accordance with Qualified Products List (QPL) No. 25161-15.

PSI alleges that the March 30, 1977, award to Parker (the only firm on the QPL at the time of award) was anti-competitive since it was made "sole-source" to a higher-priced offeror which was a large business concern (PSI is a small business); that the Navy failed to elicit a best and final offer from PSI; and that the award is contrary to an anti-trust consent decree under which Parker is required to divest itself of the product line being procured.

On the first issue, PSI states that it was nearing completion of the necessary QPL testing, and while it had not yet obtained QPL listing, the RFP did not require an offeror to acquire QPL listing by the time of proposal submission, so that the award should have been delayed for the allegedly inconsequential amount of additional time required for PSI to achieve QPL listing. PSI questions whether the Navy's stock levels were so deficient as to require the award as early as March 30, 1977.

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The Navy advises that Parker was the only source qualified and listed at the time the solicitation was issued on October 19, 1976. However, PSI requested a copy of the RFP and reported to ASO by letter of November 5, 1976, that it was fabricating two sample test units for submission to the Naval Air Propulsion Test Center (NAPTC) for inclusion on the QPL. According to the contracting officer, difficulties were encountered with PSI's qualification testing which precluded a delay in awarding the contract. The contracting officer reports:

"* * * On 16 February 1977 Mr. Frederick Earton of PSI phoned Mr. Jacobs (the ASO buyer) and told him that PSI expected to complete its portion of the testing by 1 March and thereafter ship the data and nozzles to NAPTC. On 2 March Mr. Rudy Harrer of NAPTC called Mr. Jacobs and stated that PSI's submission to NAPTC would be delayed until approximately 14 March. He also stated that NAPTC would likely require two months in which to analyze and evaluate the PSI items and data. On 15 March Mr. Burton called Mr. Jacobs again and reported that PSI was encountering some problems and that the company had been unable to adhere to the 14 March date for submission to NAPTC. It was at about this time that the Contracting Officer decided to proceed with award to Parker Hannifin. The item was already in a critical stock position; as of 7 March there were 72 outstanding unfilled orders with a projected quarterly usage of 73 units. These figures were offset by a quantity of 47 on hand and ready-for-issue, 42 more on hand but in need of repair, and 31 to be delivered under an existing contract. With deliveries from Parker Hannifin not beginning until six months after date of contract, it was imperative that a new contract be issued soon. Because of both the impending urgent need for the item and the uncertainties surrounding the qualification efforts of PSI, the Contracting Officer felt it prudent to make the award to Parker Hannifin without further delay. The company's unit price of \$375.00 was considered fair and reasonable, and award was therefore made to Parker Hannifin. Notwithstanding the pressing need for the item, the award may have been held up longer had PSI been able

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to comply with either its 1 March or its 14 March projected delivery date to NAPTC. At the time of award, however, the Contracting Officer did not know when PSI would complete its portion of the qualification testing, and he knew that it would probably take at least two additional months for evaluation by NAPTC once the items and data were eventually received there. Moreover, NAPTC lacked authority to officially approve PSI for inclusion on the QPL; any NAPTC findings and recommendations would have to be forwarded to the Naval Air Systems Command (NAVAIR) for NAVAIR approval before PSI could become qualified for inclusion on the QPL. As a matter of information, the nozzles and data were delivered to NAPTC on 6 April and NAPTC initiated its portion of the qualification testing on the following day. Problems developed that same day, and the two new nozzles had to be returned to PSI for additional work. It now appears unlikely that PSI will be qualified before 1 July 1977."

Clause B-220 of the solicitation specified, in pertinent part, that any award would be made only for items that had been tested and placed on the QPL prior to time of award. Since PSI had not qualified prior to the March 30, 1977, date of award, it was therefore ineligible for such an award notwithstanding its lower-priced offer. Moreover, under the reported circumstances, we find no basis for objecting to ASO's decision to award on March 30, 1977 to Parker, since it reasonably appeared that award had to be made prior to the date PSI could expect to be qualified. The fact that Parker is a large business does not negate the propriety of the award since the procurement was not set aside for small business.

Concerning the failure of ASO to solicit a "best and final" offer from PSI, it is doubtful under the attendant circumstances that best and final offers were required. In this regard, paragraph 10(g) of the Solicitation Instructions and Conditions warned offerors that the Government might award a contract based on initial offers received without discussion of such offers. In any

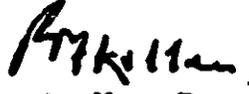
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event, we must concur with ASO that it would have been futile to solicit a best and final offer from a firm that was ineligible for award by its failure to obtain QPL listing.

As alleged by PSI, the United States and Parker, inter alia, consented to a final judgment entered by the United States District Court for the Central District of California, Civil No. 71-1011 LTL, which required Parker, within 16 months from date of entry of that judgment, to enter into a contract which would require it to divest itself "of its right, title, interest and obligations under all existing contracts, orders, proposals, quotations, and future follow-on contracts for the manufacture and sale of" various items, including the nozzles being procured under the protested award, and to accomplish the divestment within 16 months of the date of the divestiture contract. The final judgment was "entered" on September 29, 1976. Since the divestiture therefore need not be effected until 32 months from September 29, 1976, and the protested contract requires 100 percent delivery six months from the March 30, 1977 date of award, we fail to see how this award contravenes the judgment.

In short, we find nothing improper with the "sole-source" award in this case. The record indicates that only Parker could satisfy the Navy's requirement within the time restraints presented. Although PSI desired to qualify for the award, the Navy was not required to forego making a sole-source or noncompetitive award to the only concern able to meet its needs where unacceptable delays would have been incurred by the deferral of award until PSI satisfied required testing requirements. See Stewart-Warner Corporation, B-182536, February 26, 1975, 75-1 CPD 115.

Accordingly, the protest is denied.


Deputy Comptroller General
of the United States